FILED
United States Court of Appeals
Tenth Circuit

June 6, 2014

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: ERIC LAMONT JOHNSON, Movant.	No. 14-2087 (D.C. Nos. 1:03-CR-00477-MV-1 & 1:11-CV-00037-MV-LAM) (D. N.M.)

ORDER

Before **LUCERO**, **HOLMES**, and **BACHARACH**, Circuit Judges.

Eric Lamont Johnson, a federal prisoner appearing pro se, seeks authorization to file a second or successive motion under 28 U.S.C. § 2255. *See id.* § 2255(h). Because he fails to meet the requirements for authorization, we deny his motion and dismiss this matter.

In return for the dismissal of two other counts, Mr. Johnson pled guilty in 2004 to possession of a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A). After numerous delays, including competency proceedings, the court sentenced Mr. Johnson to a term of 180 months' incarceration as a career offender. We affirmed his conviction and sentence on appeal. *United States v. Johnson*, 376 F. App'x 858, 862 (10th Cir. 2010).

Mr. Johnson timely filed a § 2255 motion that raised ten claims: six claims of ineffective assistance of counsel; three claims of prosecutorial misconduct; and one

`claim of district court error in denying his motion to withdraw his guilty plea. The district court denied relief, and we denied Mr. Johnson a certificate of appealability and dismissed his appeal, *United States v. Johnson*, 529 F. App'x 876, 879 (10th Cir. 2013). The Supreme Court later denied certiorari. *Johnson v. United States*, 134 S. Ct. 1041 (2014).

Several months after we denied the certificate of appealability, Mr. Johnson filed a motion in the district court under Fed. R. Civ. P. 60(b) seeking immediate release. Relying primarily on *Bailey v. United States*, 516 U.S. 137 (1995), Mr. Johnson argued that there was insufficient evidence that he actively employed a firearm to support the § 924(c)(1) charge to which he pled guilty, so his conviction and sentence were void, he was actually innocent of the firearms offense, and his trial and appellate counsel were constitutionally ineffective. The district court construed the Rule 60(b) motion as an unauthorized second or successive § 2255 motion and dismissed it for lack of jurisdiction. *See In re Cline*, 531 F.3d 1249, 1252 (10th Cir. 2008) (per curiam). Mr. Johnson did not appeal.

Mr. Johnson now seeks authorization to file a second or successive § 2255 motion raising grounds similar to those he asserted in his purported Rule 60(b) motion. He contends that he was innocent of the conduct for which he was convicted and sentenced because § 924(c)(1) requires active employment of a firearm, but his guilty plea was based on only possession. In light of this, he contends, the attorney who represented him at sentencing (his fifth attorney) was constitutionally ineffective

for not arguing that his § 924(c)(1) conviction could not be used as a basis for sentencing him as a career offender.

To obtain authorization to file a second or successive § 2255 motion, Mr. Johnson must demonstrate that his proposed claims either depend on "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty of the offense," § 2255(h)(1), or rely upon "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," § 2255(h)(2). Mr. Johnson contends that he has newly discovered evidence of his innocence because he only recently learned from his former counsel that (1) *Bailey*, 516 U.S. at 14, requires evidence of "active employment" of a firearm to sustain a § 924(c)(1) conviction and (2) counsel believed that if he had made a *Bailey* argument at sentencing or in his motion to reconsider, the court might not have sentenced Mr. Johnson as a career offender. But regardless of how recently Mr. Johnson learned of *Bailey* or its implications for his conviction and sentence, neither his discovery of law that existed at the time he was convicted, nor his discovery that had counsel effectively argued the existing law he might have received a lesser sentence, constitutes "newly discovered evidence" under § 2255(h)(1).

Accordingly, the motion for authorization is denied and this matter is dismissed. This denial of authorization "shall not be appealable and shall not be the

subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court

ELISABETH A. SHUMAKER, Clerk